APPEAL NO. 93663

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.001 *et seq*. (1989 Act). A contested case hearing was convened in (city), Texas, on June 24, 1993, with the record of the hearing being closed on July 6th. The issue before hearing officer, as stated in the benefit review conference report, was whether the claimant has sustained a recurrence of his disability as a result of the injury of (date of injury). The appellant, hereinafter carrier, appeals the hearing officer's determination that the claimant had disability from August 11, 1992; carrier contends that such findings are legally barred by the doctrines of *res judicata*, collateral estoppel, and exhaustion of administrative remedies. The carrier also contends that the hearing officer's determination on the issue of disability is supported by no evidence or is against the great weight and preponderance of the evidence. No response was filed by the claimant.

DECISION

We affirm the decision of the hearing officer.

The claimant, an electrician's helper, tripped and fell in the course of working on a residence, injuring his knee, hand, back, and groin area, on (date of injury). The claimant also fell on April 9, 1992, during physical therapy.

An earlier contested case hearing was held on August 5, 1992, to consider the compensability of both incidents and whether the claimant had disability. The hearing officer in that case found the following, in pertinent part: 1) that claimant had a compensable injury on (date of injury), in which he injured his right knee, right hand, and lower back; 2) that on April 9, 1992, the claimant purposefully fell in an attempt to injure himself or to exacerbate his previous injuries while descending from a whirlpool bathtub at the (Clinic), despite the efforts of the physical therapist to prevent him from falling initially and to arrest his fall after it began; 3) that the claimant injured his cervical spine in his fall from the whirlpool bathtub and may have exacerbated his previous injuries, but that from the dearth of medical evidence relating to the extent of his injuries sustained on (date of injury), and the number of health care providers from whom he received treatment after April 9, 1992, the extent of any exacerbation of the previous injuries could not be determined from the evidence presented; 4) that the claimant had disability because he was unable to work because of his injury of (date of injury), from April 1 to April 3, 1992, and from April 6 to April 13, 1992; 5) that the carrier was liable for compensation for the claimant's injuries sustained on (date of injury); and 6) that the carrier was not liable for compensation for the claimant's injuries sustained on April 9, 1992.

Both parties appealed from the previous decision. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 92531, decided November 23, 1992, determined that the claimant's appeal of the noncompensability of the April 9th injury and of the period of disability was not timely filed. The Appeals Panel affirmed the hearing officer's determination that the claimant was injured in the course and scope of his employment on

April 1st and that the carrier had waived its right to contest compensability of that injury. It was acknowledged by the claimant that he did not seek judicial review of the Appeals Panel's decision.

Although the hearing officer in the current case did not admit into evidence the entire record from the prior hearing, the previous hearing decision and Appeals Panel decision were admitted. These indicate that claimant was initially sent by his employer to a clinic where a doctor took him off work and prescribed physical therapy for his knee injury (it was during a physical therapy session that the April 9th fall--which the hearing officer determined was purposeful on claimant's part--occurred).

Also, after claimant's April 1st injury his family doctor, (Dr. M), took him off work for the remainder of the week and referred him to (Dr. A). Dr. A wrote that the claimant had a mild to moderate contusion on his knee, had only an old fracture to his hand, which was swollen, and muscle spasm in his low back; he put claimant on a "no work" status pending recheck, although an April 14, 1992, letter from Dr. A indicates that claimant did not keep an April 13th appointment. Objective testing was apparently not conducted until after the April 9th fall.

A May 1992 MRI of the knee lists findings "suggestive of what appears to be a horizontal tear involving the posterior aspect of the medial meniscus." The same month, an MRI of the cervical spine showed spur formation and bulging at C5-6 and an MRI of the lumbar spine found an L5-S1 protrusion indicating a "likely" central disc herniation. There was also evidence that the claimant had not worked since his injury of April 1st. Other doctors he had seen as of the date of the first hearing included (Dr. Ma), who diagnosed a hand fracture and applied a cast; (Dr. H), who was claimant's treating doctor and who diagnosed the herniated disk; (Dr. Z), a neurosurgeon; and Dr. G.

At the hearing in the instant case, the hearing officer made clear that he would only consider evidence of disability from the period of time after August 5, 1992, when the record of the first contested case hearing closed. The claimant's evidence at this hearing included medical records after that date from some of the doctors he had seen prior to the first hearing as well as his own testimony. The claimant's evidence also included clarifying medical evidence not presented at the yearlier hearing.

Dr. Z (who is referred to in the previous decision although it does not appear that any medical records from him were at that time in evidence) treated claimant after August 5, from September 8, 1992, to at least March 23, 1993, and he did not release claimant to return to to work during that time. Dr. Z ordered lumbar and cervical myelograms which found central indentation of the thecal sac at L5-S1 and an extradural defect at C4-5; he also ordered a CT scan of the lower lumbar spine which found a small disk herniation at L5-S1.

The record also shows that Dr. H issued off-work slips to claimant from April 1992 to May 1993, citing the cervical and lumbar disk herniations, a right medial meniscus tear, and contusion or fracture of the right hand. He also issued off-work slips on and after August 11, 1992. The record of this case, unlike that of the earlier case, includes the first page of an April 15, 1993, letter to carrier's representative on Dr. H's letterhead. The letter states that claimant "was already disabled" when he was injured on April 9th; that his right knee would require surgery as a result of the on-the-job injury; and that the herniated lumbar disk was caused by the injury of April 1st and not that of April 9th. The letter also states that "the injury of April 9, 1992, was an aggravation not a cause of his present disability."

The claimant testified at the hearing that he was not currently working because he had just had knee surgery on his injured knee performed by (Dr. D). A May 6, 1993, letter from Dr. D indicated he had seen claimant on that date on referral from Dr. H, and that he limited his examination to claimant's knee. He noted claimant's May 1992 MRI report, which suggested a horizontal tear of the medial meniscus, and concluded that "[s]ince [claimant] has continued to have problems for almost a year, in my opinion [he] needs to have an arthroscopic evaluation and probably a medial meniscus surgery." The surgery was performed sometime in May; Dr. D also took claimant off work for two weeks on May 26th, and for three weeks on June 30th.

At the carrier's request the claimant was seen again by Dr. A on March 31, 1993. Dr. A observed that he had previously seen claimant in April of 1992. He noted claimant's studies and stated he was currently undergoing epidural steroid injections from Dr. Z but not responding well to anything. With regard to claimant's knee, Dr. A said "I think the [claimant's] symptoms are on the opposite side where he is suppose (sic) to have a problem by MRI. And in view of his reaction to the examination, I would be very hesitant to arthroscope this patient." Although not an issue at this hearing, Dr. A found the claimant had reached maximum medical improvement, stating that "I cannot see any difference between the way he was back in April and during this examination," and assigned an impairment rating.

The hearing officer found that after August 5, 1992, Dr. H took the claimant off work on August 11th, and numerous times afterwards, for a herniated lumbar disk, a fractured right hand, and his right knee. He accordingly determined that the claimant had shown by a preponderance of the evidence that he had disability beginning on August 11, 1991, and continuing. In its appeal, the carrier contends that the hearing officer's findings are barred by the doctrines of *res judicata*, collateral estoppel, and exhaustion of administrative remedies, and were supported by no evidence or were against the great weight and preponderance of the evidence.

In support of its first point of error, the carrier contends that the 1989 Act contains no

express or implied restriction upon the fact finder's ability to consider evidence of and make a determination regarding past and future disability. Thus, carrier says, the claimant and the hearing officer assumed, incorrectly, that the disability issue in the first contested case hearing was limited by the date of August 11, 1992.[1] In actuality, carrier contends, there was no such time limitation on the first hearing officer, the issue as framed in that hearing created no such limitation, and the assumption of such limitation can create discord between the administrative procedure and subsequent judicial review.

The carrier further argues that the instant proceeding is barred by *res judicata* in which a final judgment upon a matter is conclusive of the rights of the parties in all other actions on the issues adjudicated in the first suit, or by collateral estoppel, which bars relitigation in a subsequent action upon a different cause of action based on fact issues actually litigated and essential to a prior judgment.

The majority finds the carrier's arguments wholly without merit. We would be the first to agree that *res judicata* would not permit the claimant to reopen the issue of the period of disability that was considered in the first decision. That hearing officer had to decide the issues before her based upon the evidence presented, which apparently lacked sufficient information for her to be able to differentiate between claimant's injuries from the two incidents, one compensable, and one not compensable. But the Appeals Panel has consistently pointed out that disability can recur. Texas Workers' Compensation Commission Appeal No. 92257, decided August 3, 1992; Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. Unlike other issues relating to compensability, the existence of "disability" is not fixed but depends upon many factors which can change over the continuum of an injured employee's recovery, such as return to work or change in physical condition. A claimant must be paid temporary income benefits on a weekly basis; the parties cannot reduce a recovery for such benefits to a lump sum. Section 408.081(b); Section 408.005(a). The Commission may order lump sum payment of temporary income benefits in a lump sum only if they are accrued, but not paid. Section 408.064. Both parties are thus free, under the 1989 Act, to re-examine the existence of disability at any time up to the point where the injured employee reaches maximum medical improvement. The hearing officer in this case did not carry his findings into the earlier time period already litigated, but addressed his analysis solely to a time period following the closing of the prior record.

Likewise, the previous hearing decision affirmatively found disability for certain periods only. It did not purport to adjudicate the absence of disability as to future time periods after the date the record in that case closed. Even if we agreed, for purposes of

[1]The record below shows that the hearing officer on his own motion limited all evidence to that arising after August 5, 1992, the date the record of the first hearing closed. His finding of disability based upon the date of August 11th was apparently related to the first evidence of disability following August 5th.

argument, that the doctrine of *res judicata* could apply to bar re-examination of disability for future periods, it would not factually apply here.

In response to the carrier's collateral estoppel point of error, we would note that by operation of the restrictions on claimant's being able to change treating doctors present in the 1989 Act, the same doctor (or doctors) will usually be involved in rendering opinions at any point in time during a claimant's treatment. We do not read the case law on collateral estoppel to preclude the consideration, for purposes of adjudicating disability, of additional medical evidence developed prospectively after a hearing decision, or of prospective clarifying medical evidence, so long as the time period considered is not the same. The hearing officer in the previous decision clearly stated that she did not have before her evidence allowing an allocation of injuries between the two falling incidents. In the present case, such evidence exists by virtue of Dr. H's April 1993 letter. The hearing officer could therefore conclude that the condition(s) for which claimant was taken off work from and after August 11th by the same doctor, was for injuries relating to the (date of injury), fall.

There being sufficient evidence to support the hearing officer's decision, we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING IN PART AND DISSENTING IN PART:

I agree with this majority that, because this panel has consistently held that a claimant's disability can recur within the course of a single compensable injury, the issue of disability with regard to subsequent time periods would not be barred by *res judicata*. However, I believe that a subsequent determination on the issue of disability would require some evidence of a changed condition or circumstance that was not, nor could not have been, produced at the first hearing. In this case, I would concur with a finding of disability for the period of time covering claimant's knee surgery and recovery, which occurred after the close of the first hearing. However, the hearing officer in this case found that claimant's treating doctor took him off work on August 11, 1992, and numerous times afterwards, for a

herniated lumbar disc, a fractured right hand, and his right knee. I would not agree that the doctor's off-work slips for these injuries, which are substantively the same as those issued prior to the second contested case hearing and which were considered by the first hearing officer in making a determination that claimant had disability only for a very limited period of time, are evidentiary of any changed circumstance that would indicate the recurrence of disability.

Lynda H. Nesenholtz
Appeals Judge